Bank Utama (M) Bhd v GKM Amal Bhd

HIGH COURT (KUALA LUMPUR) — WINDING-UP NO D2-28-553 OF 1999
ABDUL AZIZ J
25 FEBRUARY 2000

Companies and Corporations — *Winding-up — Advertisement of petition — Advertising done earlier than seven clear days before hearing — No injustice caused — Whether advertisement valid — Companies (Winding-up) Rules 1972 rr 24 & 194*

Companies and Corporations — *Winding-up — Disputed debt — Respondent appealed against judgment sum — Whether debt can still form basis of winding-up petition — Whether debt disputed*

The petitioner petitioned to wind-up the respondent company. The respondent raised two objections: (i) there was non compliance of r 24 Companies (Winding-up) Rules 1972 which requires that the advertising must be done exactly seven clear days before the hearing and cannot be done earlier unless the court so directs; and (ii) as there is an appeal to the Court of Appeal, the summary judgment which the petitioner had obtained cannot form the basis for the winding-up petition as the debt is disputed.

Held:

(1) The advertising was done earlier than the seven days without court's direction. Since it does not do injustice to anybody and is, on the contrary, beneficial to creditors, it is an irregularity which, by virtue of r 194, does not invalidate the advertisement (see p 659F–G).

(2) A disputed debt in the context of a winding-up petition is a debt in respect of which it is shown, with grounds supported by evidence, that there is a bona fide dispute (see p 660A–B); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 not followed. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is bona fide disputed (see p 660B–C).

[Bahasa Malaysia summary

Pempetisyen telah membuat petisyen untuk menggulungkan syarikat responden. Responden telah menimbulkan dua bantahan: (i) wujud ketidakpatuhan k 24 Kaedah-Kaedah (Penggulungan) Syarikat 1972 yang menghendaki bahawa pengiklanan sepatutnya dibuat tepat tujuh hari lapang sebelum perbicaraan dan tidak boleh dibuat lebih awal kecuali jika mahkamah memerintahkan sedemikian; dan (ii) memandangkan wujud satu rayuan ke Mahkamah Rayuan, satu

penghakiman terus yang telah diperoleh oleh pempetisyen tidak boleh membentuk asas bagi petisyen penggulungan tersebut kerana hutang tersebut adalah dipertikaikan. A

Diputuskan:

(1) Pengiklanan telah dibuat lebih awal daripada tujuh hari tanpa perintah mahkamah. Memandangkan, ia tidak bersifat tidak adil kepada sesiapa dan adalah, sebaliknya, memanfaatkan pemiutang, ia adalah satu luar aturan di mana, menurut k 194, tidak mentaksahkan iklan tersebut (lihat ms 659F–G). B

(2) Hutang yang dipertikaikan di dalam konteks satu petisyen penggulungan merupakan satu hutang di mana ditunjukkan, dengan alasan-alasan yang disokong oleh keterangan, bahawa wujud satu pertikaian yang bona fide (lihat ms 660A–B); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 tidak diikut. Penghakiman tersebut adalah baik sehingga ia diketepikan semasa rayuan, dan ia boleh dikuat kuasakan kecuali jika satu penggantungan telah diberikan. Hakikat bahawa penghutang telah memasukkkan satu rayuan terhadap penghakiman tersebut hanya bermaksud bahawa beliau masih mempertikaikan hutang tersebut tetapi tidak menunjukkan bahawa hutang tersebut dipertikaikan secara bona fide (lihat ms 660B–C).] C D E

Notes

For cases on advertisement of winding-up petition, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) at paras 618–619.

For cases on disputed debt in relation to winding-up, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) at paras 651–653. F

Cases referred to

Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 437 (not folld) G

Legislation referred to

Companies (Winding-up) Rules 1972 rr 24, 194
Insolvency Rules 1986 r 4.11(2)(b) [Aust]
Companies (Winding-up) Rules 1949 r 28 [UK] H

Edwin Koh (*Raja Darryl & Loh*) for the petitioners.
Ong Chee Keong (*Ong Manickam & Co*) for the respondents.

Cur Adv Vult I

Abdul Aziz J: The following is my decision on the two points raised by learned counsel for the respondents in opposition to this petition.

Rule 24

Rule 24 of the Companies (Winding-up) Rules 1972 requires every petition to be advertised, in the manner laid down, 'seven clear days or such longer time as the court may direct before the hearing'. It would appear that the advertising must be done exactly seven clear days before the hearing and cannot be done earlier unless the court so directs. I find the rule most unusual. Its purpose is to give to creditors notice of the petition. Statute does not usually, in requiring something to be done, provide for it to be done exactly on a specific day. One might find it being required to be done, for example, not later than a certain date, in which case it may be done earlier than that date; or at least a number of days before a certain date, in which case it may be done earlier than the prescribed number of days. In the case of r 24, one would expect that the direction of the court will only be necessary if the advertising were to be done a shorter period of days before the hearing and that no direction of the court will be necessary if it were to be done earlier than the prescribed number of days because a longer notice would be better for creditors and would not prejudice anybody. I am puzzled as to the reason why r 24 is drafted in the way that it is. Neither counsel has been able to suggest a reason. It makes me wonder if there has been an error in the thinking, or in the expression of the thinking, behind r 24.

Counsel's research has revealed that in Australia the time for advertising is not less than fourteen days before the hearing and that in England, under r 4.11(2)(b) of the Insolvency Rules 1986, it is 'not less than seven business days after service of the petition on the company, nor less than seven business days before the day' appointed for the hearing. In England, under r 28 of the Companies (Winding-up) Rules 1949, it used to be 'seven clear days before the hearing', but because there was no provision, such as exists in our r 24, for the court to direct a longer time, I should think that a longer number of clear days would have been acceptable as a matter of course.

In this case the advertising was, without court direction, done earlier than the seven days. Technically, therefore, it is an irregularity. Since, however, it does not do injustice to anybody and is, on the contrary, beneficial to creditors, I rule that it is an irregularity which, by virtue of r 194, does not invalidate the advertisement.

The question of dispute

This petition is based on a summary judgment. An appeal against the summary judgment has been dismissed. The respondents have appealed further to the Court of Appeal and the appeal has not been decided. There has been no stay of execution pending appeal. Learned counsel for the respondents submitted that because there is an appeal to the Court of Appeal, the debt is disputed and cannot form the basis for a winding-up petition. He relied on the following pronouncement by Rekhraj J in *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 at p 439I:

> But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal.

With respect, my understanding of what is meant by a disputed debt in the context of a winding-up petition is that it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a bona fide dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no bona fide dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is bona fide disputed. The judgment has already established the contrary.

I make orders in terms of paras 10(a), (b) and (c) of the petition.

Order accordingly.

Reported by Benjamin Yong